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8

9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11 UNITED STATES OF AMERICA,) Case No. 07CR3190-JAH
12)
Plaintiff,)
13) **GOVERNMENT'S TRIAL MEMORANDUM**
v.)
14)
JOSE RAYMUNDO) Date: May 13, 2008
15 CONTRERAS-HERNANDEZ,) Time: 9:00 a.m.
16 Defendant.) Court: Hon. John A. Houston
17)
_____)

18 Comes now the Plaintiff, the UNITED STATES OF AMERICA, by and
19 through its counsel, Karen P. Hewitt, United States Attorney, and
20 Peter J. Mazza, Assistant U.S. Attorney, and hereby files its Trial
21 Memorandum.

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I

STATEMENT OF THE CASE

A. INDICTMENT

On November 23, 2007, a federal grand jury in the Southern District of California returned a one-count Indictment charging Jose Raymundo Contreras-Hernandez ("Defendant") with Deported Alien Found in the United States, in violation of Title 8, United States Code, Section 1326. The Indictment further alleged that Defendant had been removed from the United States subsequent to October 28, 2005.

B. TRIAL STATUS

Trial is scheduled for May 13, at 9:00 a.m., before the Honorable John A. Houston. The Government estimates that its case-in-chief will last approximately one day.

C. DEFENSE COUNSEL

Defendant is represented by appointed counsel, Candis Mitchell of Federal Defenders of San Diego, Inc.

D. DEFENDANT'S CUSTODY STATUS

Defendant is in custody.

E. INTERPRETER

The Government does not require the assistance of an interpreter for any of its witnesses, but Defendant may require an interpreter.

F. JURY WAIVER

Defendant has not waived trial by jury.

G. PRE-TRIAL MOTIONS AND MOTIONS IN LIMINE

On December 18, 2007, Defendant filed motions for discovery and leave to file additional motions. On December 29, 2007, the Government filed motions for fingerprint exemplars and reciprocal

1 discovery. On that same day, the Government filed its response in
2 opposition to Defendant's motion for discovery.

3 On February 5, 2008, Defendant filed a motion to dismiss the
4 indictment due to an invalid deportation and to suppress statements.
5 On March 3, 2008, the Government filed its response in opposition.
6 On March 10, 2008, the Court denied Defendant's motion to dismiss the
7 indictment, finding that Defendant's prior conviction constitutes an
8 aggravated felony. The Court also denied the Defendant's motion to
9 suppress field admissions made by Defendant. The Court further ruled
10 that, to the extent that statements were made after six hours
11 following Defendant's arrest, an evidentiary hearing should be held.
12 Because no statements were made after six hours, no evidentiary
13 hearing was held.

14 On March 29, 2008, Defendant filed Motions in Limine to (1)
15 compel the Government to prove the validity of the deportation to the
16 jury; (2) exclude evidence not produced in discovery; (3) exclude
17 documents absent redaction; (4) preclude testimony from Government
18 witnesses referring to Defendant as an "Alien;" (5) provide inspection
19 or production of certified documents; (6) preclude introduction of
20 "mug shots" of Defendant; (7) prohibit the certificate of nonexistence
21 of record as inadmissible; (8) preclude evidence under Federal Rule
22 of Evidence 404(b) and 609; (9) allow attorney-conducted voir dire;
23 (10) order production of grand jury transcripts; (11) preclude
24 documents of deportation as evidence of alienage; and (12) grant leave
25 to file additional motions. On April 7, 2008, the Government its
26 response in opposition.

27 On April 14, 2008, the Court held a motions in limine hearing.
28 The Court denied Defendant's motion to compel the Government to prove

1 the validity of the deportation; granted, except for a certificate of
2 nonexistence, Defendant's motion to exclude evidence not produced in
3 discovery; ordered the Government to redact certain documents; ordered
4 that Government witnesses address Defendant as "Defendant;" granted
5 Defendant's motion to inspect documents before trial; denied motion
6 that certificate of nonexistence is inadmissible; denied motion to
7 exclude Government from using 609 impeachment evidence; granted motion
8 for attorney-conducted voir dire; denied motion to produce grand jury
9 transcripts; denied motion to preclude Government from using
10 immigration documents to prove alienage; and granted Defendant's
11 motion to file additional motions so long as they are based on newly
12 discovered evidence.

13 **H. STIPULATIONS**

14 The Government and Defendant have not entered into any
15 stipulations.

16 **I. DISCOVERY**

17 The Government has complied with its discovery obligations.
18 Defendant has not provided reciprocal discovery.

19 **II**

20 **STATEMENT OF FACTS**

21 **A. THE INSTANT OFFENSE**

22 On October 27, 2007, United States Supervisory Border Patrol
23 Agent Mark E. Noland was conducting assigned patrol duties in the
24 Campo Border Patrol Stations area of operations. At approximately
25 3:00 a.m., Agent Noland responded to a seismic intrusion device
26 located on a trail known to be used by illegal aliens to further their
27 illegal entries into the United States. The seismic intrusion device
28 is located approximately nine miles east of the Tecate, California

1 Port of Entry and approximately 13 miles north of the United
2 States/Mexico international boundary.

3 Upon arriving at the location of the seismic intrusion device,
4 Agent Noland observed fresh footprints headed in a northbound
5 direction. Agent Noland followed the footprints north until he came
6 upon a group of ten individuals attempting to conceal themselves.
7 Agent Noland identified himself as a United States Border Patrol
8 agent. He then questioned each individual regarding his/her
9 immigration status. All ten individuals, including Defendant, stated
10 that they were citizens and nationals of Mexico without any documents
11 to allow them to enter or remain in the United States legally.
12 Defendant and the other nine individuals were taken into custody and
13 transported to the Campo, California Border Patrol Station.

14 At the station, Defendant's personal information was entered
15 into immigration and criminal history databases. Defendant's identity
16 was confirmed, along with his criminal and immigration histories.

17 At approximately 3:00 p.m., Agents informed Defendant of his
18 Miranda rights. Defendant invoked those rights. No questions were
19 asked of Defendant.

20 **B. DEFENDANT'S IMMIGRATION HISTORY**

21 Defendant is a citizen and native of Mexico. On September 26,
22 2007 an Assistant Field Office Director of Immigration and Customs
23 Enforcement ordered Defendant removed from the United States to Mexico
24 pursuant to a Final Administrative Removal Order. On September 27,
25 2007, Defendant was physically removed from the United States to
26 Mexico through the Calexico, California Port of Entry.

27 //

28 //

1 **C. DEFENDANT'S CRIMINAL HISTORY**

2 Defendant was convicted of Solicitation to Commit Murder, in
3 violation of California Penal Code Section 653F(B) by a California
4 Superior Court in Santa Cruz, California on October 28, 2005. The
5 court sentenced him to serve six years in custody.

6 **III**

7 **PERTINENT LAW**

8 **A. ELEMENTS OF 8 U.S.C. §1326**

9 The Government must prove each of the following elements beyond
10 a reasonable doubt:

- 11 1. Defendant was deported from the United States;
- 12 2. After deportation, Defendant voluntarily entered the
13 United States;
- 14 3. When Defendant entered he knew he was entering the
15 United States or after the defendant entered the
16 United States he knew that he was in the United
17 States and knowingly remained;
- 18 4. Defendant was found in the United States without
19 having obtained the consent of the Attorney General
20 or the Secretary of the Department of Homeland
21 Security to reapply for admission into the United
22 States; and
- 23 5. Defendant was an alien at the time of the
24 defendant's entry into the United States.

25 See 9th Cir. Model Crim. Jury Instructions 9.5B (2007); see
26 also United States v. Salazar-Gonzalez, 458 F.3d 851, 856 (9th Cir.

1 2006).¹

2 IV

3 WITNESS LIST

4 The Government reserves the right to add, omit, substitute, or
5 change the order of witnesses. Presently, the Government intends to
6 call the following witnesses during its case-in-chief:

- 7 1. Border Patrol Agent Mark E. Noland
- 8 2. Border Patrol Agent Ronald Ewers
- 9 3. Immigration Enforcement Agent Daniel Weiche
- 10 4. Fingerprint Expert David Beers
- 11 5. A-File Custodian Sean Braud

12 V

13 EXHIBIT LIST

14 The Government will provide a complete exhibit list prior to
15 trial. The Government requests that Defendant examine the
16 Government's exhibits before trial to expedite the proceedings. The
17 Government further requests an opportunity to examine Defendant's
18 exhibits before trial. Presently, the Government intends to offer
19 into evidence the following exhibits:

- 20 1. Map of Apprehension Area
- 21 2. Photographs of Apprehension Area
- 22 3. Fingerprint card from instant arrest, dated October
23 27, 2007
- 24 4. Notice of Intent to Issue a Final Administrative
25 Removal Order, dated September 25, 2007

27 ¹ The Government will request a special verdict form indicating that the Defendant was
28 removed subsequent to October 28, 2005. See United States v. Jose Covian-Sandoval, 462 F.3d
1090 (9th Cir. 2006).

1 5. Final Administrative Removal Order, dated September
2 26, 2007

3 6. Warrant of Removal, dated September 27, 2007

4 7. Certificate of Non-Existence of Record

5 **VI**

6 **OTHER LEGAL ISSUES**

7 **A. EXPERT TESTIMONY**

8 The Government intends to call as a witness a fingerprint
9 expert, David Beers, for the purpose of identifying Defendant as the
10 person who was previously deported. Such expert testimony should be
11 admitted to assist the jury in understanding that this Defendant is
12 an alien who was found in the United States after having been
13 deported. See Federal Rule of Evidence 702; United States v. Alonso,
14 48 F.3d 1536, 1539 (9th Cir. 1995); United States v. Lennick, 18 F.3d
15 814, 821 (9th Cir. 1994). The Government has provided written notice
16 of its intention to use expert testimony. This notice also included
17 a written summary of testimony the Government intends to use pursuant
18 to Federal Rules of Evidence 702, 703, and 705, during the trial in
19 the above-referenced criminal matter. Accordingly, such evidence is
20 proper and should be admitted.

21 **B. 609 EVIDENCE**

22 The Government intends to use Defendant's felony conviction as
23 impeachment evidence pursuant to Federal Rule of Evidence 609. It is
24 the Government's position that if Defendant takes the stand, he would
25 do so to dispute at least one of the elements of the charges brought
26 against him, and therefore, his credibility would be at issue. In
27 addition, evidence of the convictions would be relevant to refute any
28 claim that Defendant was not subject to deportation.

1 **C. A-FILE DOCUMENTS AND WITNESS**

2 The Government intends to offer documents from the "A-File"
3 maintained by the Department of Homeland Security and its predecessors
4 that corresponds to Defendant's name in order to establish Defendant's
5 alienage, prior deportation, and that he was subsequently found in the
6 United States without having sought or obtained authorization from the
7 Attorney General. The documents are self-authenticating under Fed.
8 R. Evid. 902(1), 902(4), and 902(11), and are exceptions to the
9 hearsay rule as "public records," or, alternatively, "business
10 records." See Fed. R. Evid. 803(8)(B) and 803(6). The Ninth Circuit
11 has addressed the admissibility of A-File documents in United States
12 v. Loyola-Dominguez, 125 F.3d 1315 (9th Cir. 1997). There, Loyola-
13 Dominguez appealed his §1326 conviction, arguing, among other issues,
14 that the district court erred in admitting at trial certain records
15 from the illegal immigrant's "A-File." Id. at 1317. The district
16 court had admitted: (1) a warrant of deportation; (2) a prior warrant
17 for the defendant's arrest; (3) a prior deportation order; and (4) a
18 prior warrant of deportation. Loyola-Dominguez argued that admission
19 of the documents violated the rule against hearsay, and denied him his
20 Sixth Amendment right to confront witnesses. The Ninth Circuit
21 rejected his arguments, holding that the documents were properly
22 admitted as public records. Id. at 1318. The court noted that
23 documents from a defendant's immigration file, although "made by law
24 enforcement agents . . . reflect only 'ministerial, objective
25 observation[s]'" and do not implicate the concerns animating the law
26 enforcement exception to the public records exception." Id. (quoting
27 United States v. Hernandez-Rojas, 617 F.2d 533, 534-35 (9th Cir.
28 1980)). The court also held that such documents are self-

1 authenticating and, therefore, do not require an independent
2 foundation. Id.

3 While Loyola-Dominquez constitutes a fairly recent restatement
4 of the rules governing public and business records, courts in this
5 Circuit have also consistently held that documents from a defendant's
6 immigration file are admissible in a §1326 prosecution to establish
7 the defendant's alienage and prior deportation. See United States v.
8 Mateo-Mendez, 215 F.3d 1039, 1042-45 (9th Cir. 2000) (confirming
9 district court's decision to admit certificate of nonexistence);
10 United States v. Contreras, 63 F.3d 852, 857-58 (9th Cir. 1995)
11 (affirming admission of warrant of deportation, deportation order and
12 deportation hearing transcript); United States v. Hernandez-Rojas, 617
13 F.2d 533, 535 (9th Cir. 1980) (holding that district court properly
14 admitted warrant of deportation as public record); United States v.
15 Dekermenjian, 508 F.2d 812, 814 n.1 (9th Cir. 1974) (finding that
16 district court properly admitted "certain records and memoranda of the
17 Immigration and Naturalization Service" as business records and noting
18 that such documents would also be admissible as public records).

19 The Government intends to call United States Border Patrol
20 Agent Sean Braud in its case in chief. Although Agent Braud will not
21 give expert opinions based upon specialized knowledge, he will testify
22 regarding documents contained in Defendant's A-File. See Fed. R.
23 Evid. 701 (such testimony is "helpful to a clear understanding of the
24 determination of a fact in issue"); United States v. VonWillie, 59
25 F.3d 922, 929 (9th Cir. 1995) (finding, with regard to testimony in
26 a drug case, that "[t]hese observations are common enough and require
27 such a limited amount of expertise, if any, that they can, indeed, be
28 deemed lay witness opinion"); United States v. Loyola-Dominquez, 125

1 F.3d 1315, 1317 (9th Cir. 1997) (affirming testimony of agent who
2 "served as the conduit through which the government introduced
3 documents from INS' Alien Registry File"). Here, Agent Braud will
4 testify regarding the purpose of the A-File, what documents are
5 contained within the A-File, and will explain those documents. Agent
6 Braud will also testify to results of database searches that he
7 personally conducted to determine whether Defendant applied for or
8 obtained authorization from the Attorney General of the United States
9 to apply to enter, or to enter, into the United States. As the
10 Government indicated in its motions in limine, such testimony is
11 proper in a §1326 case.

12 **D. ALIENAGE**

13 The Ninth Circuit has held that "deportation documents are
14 admissible to prove alienage under the public records exception to the
15 hearsay rule." United States v. Hernandez-Herrera, 273 F.3d 1213,
16 1218 (9th Cir. 2001). The Ninth Circuit also has described the type
17 of documents that may be used as evidence of alienage:

18 Although neither a deportation order, see United States v.
19 Sotelo, 109 F.3d 1446, 1449 (9th Cir. 1997) (citing United
20 States v. Ortiz-Lopez, 24 F.3d 53, 55 (9th Cir. 1994)), nor
21 the defendant's own admissions, see United States v.
22 Hernandez, 105 F.3d 1330, 1332 (9th Cir. 1997), standing
23 alone, will support the conclusion that a defendant is an
24 alien, here the government offered Ramirez-Cortez's prior
25 deportation order, admissions Ramirez-Cortez made in his
26 underlying deportation proceeding, and the testimony of an
27 INS agent that his review of Ramirez-Cortez's immigration
28 records reflected that Ramirez-Cortez was an alien. Based
on this evidence, a rational trier of fact could have found
beyond a reasonable doubt that Ramirez-Cortez was an alien.
Cf. United States v. Sotelo, 109 F.3d 1446, 1449 (9th Cir.
1997) (finding sufficient evidence of alienage where the
government's evidence consisted of a prior deportation order,
the defendant's admissions to an INS agent that he was a
Mexican citizen, and his admissions during the deportation
hearing that he was not a United States citizen); United
States v. Contreras, 63 F.3d 852, 858 (9th Cir. 1995)
(holding that sufficient evidence supported the conviction

1 when the government introduced a prior deportation order, the
2 deportation hearing transcript, which indicated that the
3 defendant admitted his Mexican citizenship under oath, and
testimony of an INS agent that the defendant was a Mexican
citizen).

4 United States v. Ramirez-Cortez, 213 F.3d 1149, 1158 (9th Cir. 2000)
5 (emphasis added).

6 The Ninth Circuit has also affirmed the admission of Orders to
7 Show Cause, see Sotelo, 109 F.3d at 1449, admissions made during
8 deportation hearings, see id., and transcripts, see Contreras, 63
9 F.3d at 858. In Sotelo, the Ninth Circuit described a list of
10 evidence that was admitted at trial which supported a defendant's
11 §1326 conviction:

12 The prosecution also presented several documents from the
13 prior deportation proceeding. During the deportation
14 hearing, Sotelo admitted, through his lawyer, allegations in
15 the order to show cause that he is not a citizen or national
16 of the United States and he is a native and citizen of
17 Mexico. The prosecution presented the order to show cause
and an advisement of rights form, which Sotelo signed. The
advisement of rights form stated that Sotelo admitted he was
in the United States illegally. Finally, the prosecution
presented the order of deportation and the warrant of
deportation, evidencing Sotelo's actual deportation.

18 Sotelo, 109 F.3d at 1449 (emphasis added).

19 **E. PHYSICAL REMOVAL**

20 The Ninth Circuit has held that deportation "refers to the
21 removal from the country of aliens who are physically present in the
22 United States." United States v. Romo-Romo, 246 F.3d 1272, 1275-76
23 (9th Cir. 2001); see also United States v. Luna-Madellaga, 315 F.3d
24 1224, 1227 (9th Cir. 2003) (holding that §1326 speaks only of
25 "removal" and that the statute "plainly turns on the alien's physical
26 removal -- not the order of removal"). Thus, the Government need only
27 prove beyond a reasonable doubt that Defendant physically left the
28 country sometime between the time he was ordered deported and the time

1 he was found in the United States. See United States v.
2 Bahena-Cardenas, 411 F.3d 1067, 1074-75 (9th Cir. 2005).

3 **F. EXPRESS CONSENT**

4 The Ninth Circuit has stated what is required for permission
5 to reapply:

6 The INS has promulgated regulations that govern the
7 process by which the Attorney General will "[c]onsent
8 to [a deported alien] reapply[ing] for admission[.]" 8
9 C.F.R. §212.2. These regulations include the
10 requirement that a deported alien must have remained
11 outside of the United States for a minimum of five
12 consecutive years. Id. §212.2(a). Pina-Jaime did not
13 meet this requirement. Nor did he submit the required
14 form I-212 to the INS to obtain consent of the Attorney
15 General to reapply for admission. [Citations omitted.]
16 Accordingly, the Attorney General did not "expressly
17 consent[] to [Pina-Jaime's] reapplying for admission"
18 as required by the statute. See 8 U.S.C. §1326(a)(2).

19 United States v. Pina-Jaime, 332 F.3d 609, 611-12 (9th Cir. 2003).

20 As in Pina-Jaime, there is no evidence in this case that Defendant has
21 properly sought or actually obtained permission to enter the United
22 States. As a result, any cross-examination regarding the lack of
23 permission is irrelevant. United States v. Rodriguez-Rodriguez, 393
24 F.3d 849, 856 (9th Cir. 2005), is instructive in that regard. In
25 Rodriguez-Rodriguez, the defendant sought to elicit testimony on
26 cross-examination from a witness for the United States regarding the
27 following claims: (1) INS computers are not fully interactive with
28 other federal agencies' computers; (2) over 2 million documents filed
by immigrants have been lost or forgotten; (3) other federal agencies
have the ability and authority to apply for an immigrant to come into
the United States; and (4) the custodian never checked with the other
federal agencies to inquire about documents relating to the defendant.
Judge Lorenz sustained objections to this line of cross-examination

1 finding that it was irrelevant. Id. The Ninth Circuit agreed stating
2 that "[n]one of that information is relevant on the facts of this
3 case, because it is uncontested that [the defendant] never made any
4 application to the INS or any other federal agency." Id. Here, as
5 in Rodriguez, Defendant has not presented any evidence that he
6 properly applied for reentry.

7 **G. LAWFULNESS OF PRIOR DEPORTATION**

8 Since physical removal is all that is required, the lawfulness
9 of a defendant's prior deportation is not an element of the offense
10 under §1326 and should not be presented to the jury. See United
11 States v. Alvarado-Delgado, 98 F.3d 492, 493 (9th Cir. 1996) (en
12 banc). The Government need only prove that a deportation proceeding
13 actually occurred and that the defendant was consequently deported.
14 United States v. Medina, 236 F.3d 1028, 1031 (9th Cir. 2001).

15 **H. DUPLICATES**

16 A duplicate is admissible to the same extent as an original
17 unless: (1) a genuine question is raised as to the authenticity of
18 the original; or (2) under circumstances, it would be unfair to admit
19 the duplicate instead of the original. See Fed.R.Evid. 1003.

20 **VII**

21 **PROPOSED VOIR DIRE**

22 The Government requests that the following voir dire questions
23 be addressed to the jury panel in addition to the Court's standard
24 jury questions:

- 25 1. Of those of you who have sat on criminal juries, whose jury has
26 not reached a unanimous verdict?
- 27 2. Has anyone gone through a Border Patrol checkpoint or been
referred to secondary inspection at a port of entry?
- 28 3. Has anyone had any disputes with any agency of the United

1 States Government?

2 4. Have you, your relatives, or your close friends been
3 investigated, arrested, accused, or charged with a crime?

4 5. Does anyone believe that the United States Government should
5 not patrol the border it shares with Mexico?

6 6. Does anyone have strong feelings about Border Patrol or
7 Department of Homeland Security?

8 7. Have you been following stories in the news about proposed
9 immigration law reform, the activities of the minute men and
10 protests surrounding their activities, or the proposed guest
11 worker program?

12 8. Has anyone gone through, or helped someone go through, the
13 process of applying for residency or citizenship?

14 9. Does anyone believe that it should not be illegal to enter the
15 United States without authorization?

16 10. Does everyone understand that as a juror your duty is to apply
17 the law regardless of whether you disagree with it?

18 11. Is anyone a member of a group, or have an affiliation with a
19 group, that advocates a position on immigration issues?

20 12. Does anyone have religious or moral beliefs which will make it
21 difficult for him/her to make a decision strictly based on the
22 law and facts of this case?

23 The Government respectfully reserves the right to submit
24 additional questions prior to trial.

25 **VII**

26 **JURY INSTRUCTIONS**

27 The Government will provide the Court with a set of proposed
28 instructions under separate cover.

DATED: April 30, 2008.

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

/s/ Peter J. Mazza

PETER J. MAZZA
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Case No. 07CR3190-JAH
)
Plaintiff,)
) CERTIFICATE OF SERVICE
v.)
)
JOSE REYMUNDO)
CONTRERAS-HERNANDEZ,)
)
Defendant.)
_____)
)

IT IS HEREBY CERTIFIED THAT:

I, Peter J. Mazza, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **GOVERNMENT'S TRIAL MEMORANDUM** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Candis Mitchell of Federal Defenders of San Diego, Inc.

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

None

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 30, 2008.

/s/ Peter J. Mazza
PETER J. MAZZA